UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

In re:	Case No. 01-30320-WS
HOME MAX, INC.,	Chapter 7
Debtor.	Hon. Walter Shapero

AND

In re:	Case No. 01-30369-WS
CENTURY HOMES MANUFACTURED, INC.,	Chapter 7
Debtor.	Hon. Walter Shapero

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OPINION DENYING TRUSTEE'S MOTION FOR LEAVE TO SETTLE CONTROVERSY

This matter came before the Court on the Trustee's motion for leave to settle controversy with Roland Hansen, John Stewart and Michael Downer (collectively "Shareholders"). Creditors, Don King and Lucinda Leach (collectively "Creditors") object. For the following reasons, the Court denies the trustee's motion.

Facts

On February 7, 2001, Home Max, Inc., filed a Voluntary Petition for Relief under Chapter 7 of the Bankruptcy Code. On February 13, 2001, Century Homes Manufactured, Inc., filed a Voluntary Petition for Relief under Chapter 7 of the Bankruptcy Code. Debtors are separate but related corporations, with three common shareholders engaged primarily in the sale of manufactured homes. Prior to their chapter 7 filing they were defendants in a number of state court lawsuits

brought under various Michigan consumer protection acts and on other theories, one of which resulted in a judgment of some $73,000 or so. There may have been some 20 or so such suits, all at various stages, when Debtors filed these Chapter 7 cases.

There were initial problems with the completeness and accuracy of Debtors schedules in that, among other things, debtors did not list their existing inventory of manufactured homes as assets (these homes were all subject to balances due under various types of security interests which the trustee early on concluded were in excess of the fair market value of the collateral). Debtors also did not initially list as assets their entitlement to substantial manufacturers rebates incident to future sales of the homes.

Shortly after the filings the trustee, Debtors' attorneys and the shareholders engaged in extensive discussions and negotiations relative to the indicated schedule deficiencies as well as the potential liabilities and claims arising out of the consumer protection and related cases. Included in the discussions were potential actions by the trustee on preference and fraudulent conveyance theories, involving among others a number of non-filing entities which were owned or controlled by the same shareholders. As a result and long before the claims filing deadline, the parties entered into a settlement agreement, approved by the Court on July 3, 2001, the primary thrust of which was that in return for the shareholders individually agreeing to pay to the trustee all sums necessary to pay the unsecured creditors in full, the trustee would release the manufactured home inventory to the shareholders for disposition by them and release them and any of their non-debtor entities from any other liabilities. The agreement contemplated that the shareholders were to transfer a specific sum of cash on account of their obligation, and the trustee was entitled to obtain and retain the manufacturers rebates in connection with any sales of the inventory later effected by the

shareholders.

After Court approval, some six months later the shareholders filed adversary proceedings in both cases seeking to overturn the settlement agreement and order under various theories incorporating grounds for setting aside, contracts or rescinding. The actions proceeded through discovery consisting mostly of depositions of the shareholders, their lawyers and the trustee, following which they entered into a new agreement the salient points of which were that the first agreement would be vacated and be replaced by the shareholders paying over to the trustee the sum of $150,000 in cash, with full and complete mutual releases more or less. The trustee and the shareholders applied to the Court for approval of this agreement, and that is what is before the Court.

The primary difference between the first settlement agreement and the pending one is that under the former the shareholders payment obligation was not fully quantified or limited in amount, largely because all of the consumer protection type claims were not liquidated , whereas under the latter, their obligation is.

It is vigorously opposed by the attorney for most of the consumer protection claimants as well as one other unsecured creditor.

Parties' Arguments

The Trustee and the Shareholders argue that the Trustee's motion should be granted. Creditors, King and Leach, who represent the consumer protection claimants, argue that the Trustee's motion should be denied.

I. The Trustee's Arguments

The trustee argues that the issue before the Court is solely whether it should approve this settlement of the adversary proceedings which the Shareholders seek to set aside the initial

settlement involving both Debtors, entered into between the trustee and the Shareholders. The trustee asserts that the Court must look to the Shareholders' likelihood of success in the adversary proceedings, which requires an in depth review of defenses to contract formation, and a review of the facts to see if the Shareholders can satisfy the legal requirements for any of the various defenses.

The trustee also argues that the requirements of Federal Rule of Civil Procedure 60(b), which is applicable to bankruptcy proceedings under Bankruptcy Rule 9024, do not apply, because the parties are not seeking relief "from a final judgment, order, or proceeding . . . ." Fed. R. Civ. P 60(b). Rather, the trustee argues that the only relevant Order entered in this case was an Order authorizing the trustee to sign the first settlement, and no one now seeks relief from that Order. In fact, the trustee explicitly admits that "Given that the first Settlement Agreement could result in payment in full of all claims in (both) estates, it is difficult to imagine any showing of excusable neglect, fraud, or any other factual circumstances that would show the Court's approval of that Settlement Agreement was improper," as required by Rule 60(b). Therefore, the trustee does not challenge the Order, but claims the agreement itself is void or voidable for various reasons.

II. Shareholders' Arguments

The Shareholders also argue that the standards of Rule 60(b) do not govern the trustee's motion. Rather, the Shareholders argue that the trustee is seeking approval to settle two adversary proceedings (one involving each Debtor). Therefore, the only applicable standard is whether the settlement is fair and equitable. In determining whether the settlement is fair and equitable, the Court looks to four factors set forth in Protective Committee for Independent Stockholders of TMT Trailer Ferry v. Anderson, 390 U.S. 414, 424 (1968). The Shareholders then proceed to argue that the proposed settlement is fair and equitable.

III. King's and Leach's Argument

King and Leach primarily argue that the Court should deny the trustee's motion because the prior settlement must first be set aside in order for the Court to approve the proposed settlement currently before the Court pursuant to Rule 60(b), and there is no evidence in the record to justify such relief; i.e., once the original settlement was approved by the Court, it became a final Order, and that any action to in effect set it aside, is governed by Rule 60(b), citing In re Ginther, 791 F.2d 1151 (5th Cir. 1986). That case involved a motion filed as a 60(b) motion, and as such, the question there decided was simply whether the grounds asserted (to set aside a prior court approved settlement agreement) entitled the movant to prevail. No one was there arguing that 60(b) does not apply to the situation, and it is therefore not precedent for the King and Leach position as such. But logic is. Despite the trustee's argument to the contrary, the Order approving the first settlement agreement inseparably embodies the agreement it approved, and as such it became final. The process by which Court approval of settlement agreements is obtained is designed to, and envisages, the timely assertion of any and all defenses and objections to both the validity of the agreement itself as well as its adherence to the criteria by which settlements are approved. Absent the timely and successful assertion of any such defenses or objections, the entry of such an order, like any other order, and the lack of any appeal therefrom, makes that order a final one, the setting aside of which is intended to essentially be governed exclusively by 60(b). The finality of orders approving settlements (settlements being encouraged and favored by the Courts) would be put in unacceptable jeopardy if this Court somehow permitted them to be collaterally attacked in the manner attempted here. Here, the trustee is seeking approval, over objections from affected creditors, of an agreement to settle two adversary proceedings brought to in substance set aside a previous Court approved

settlement agreement - the effect of which would be to materially alter the terms of the approved prior settlement. In substance, if not in form, what is therefore before the Court is what 60(b) motions are designed to deal with and will be treated in that way by this Court.

King and Leach also argue that there are no grounds to rescind the initial settlement if Rule 60(b) does not fully govern the situation, based on the grounds raised by the Shareholders. They argue that the Shareholders, the trustee and the creditors, represented as they were by King and Leach all sufficiently understood the initial agreement such that the Shareholders cannot now argue that either they or the trustee made a material mistake or there exists other grounds for relief under Rule 60(b). There are no significant facts in dispute.

Analysis

I. Federal Rule of Civil Procedure 60(b)

To obtain the Court's approval of his proposed settlement, the trustee must first obtain relief from the Court's Order approving the initial compromise. Rule 60(b) states:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation . . . .

Fed. R. Civ. P. 60(b). It is unclear whether, because no 60(b) motion was ever filed by the Shareholders or the trustee, the Shareholders or the trustee can now meet the one-year requirement

set out in Rule 60(b) for reasons (1), (2), and (3). However, for the purposes of this Opinion, the Court will treat the Shareholders' filing of the adversary proceedings - both of which were filed within one year of the Court's Order approving the initial compromise - as meeting the Rule's one-year prerequisite for reasons (1), (2), and (3). Nor do the parties argue under the guise of Rule 60(b), the motion was not brought within a "reasonable time," and thus, the Court in this case will treat the 60(b) motion as being brought within a reasonable time.

II. The Individual Subsections

A. Rule 60(b)(1)

A case frequently relied upon by courts in determining whether a party has met the standards set forth in Rule 60(b)(1) is Pioneer Investment Serv. Co. v. Brunswick Assoc. Ltd. Ptnrshp., 507 U.S. 380 (1993). In Pioneer, the Court held that courts must determine the existence of "excusable neglect" by making an equitable determination based upon the following factors: "(1) the danger of prejudice to the other party, (2) the length of delay, (3) its potential impact on judicial proceedings, (4) the reason for the delay, and (5) whether the movant acted in good faith." Id. at 395.

In this case, the Shareholders claim that both they and the trustee made a material, and thus mutual mistake. However, in the trustee's brief in support of this motion, the trustee states that he did not make a mistake in understanding the terms of the initial settlement. The Shareholders argue that they believed that their liability under that agreement was significantly limited. The original settlement clearly did not contain any limit on what the Shareholders might have to pay in order to satisfy all of the claims. They may have had in their own minds, or indeed might have expressed what they thought or felt they might have to end up paying. That the amount might end up being substantially more than what they anticipated is not the stuff of a "mistake" which should vitiate the

agreement on which the order was based pursuant to the criteria and policy expressed in Rule 60(b). What is involved here is the knowing taking of a risk that may turn out to be a costlier one than anticipated (and it is not even totally clear at this point that such might turn out to be the fact - though if it does - the result would not be any different.) The "mistake" if there was one, was really a unilateral one on the part of the Shareholders. As noted in the cited cases there is rather little difference between what is a "mistake" under contract or non-bankruptcy law for purposes of rescission or other vitiation, and what it is under Rule 60(b). Under Michigan law, a unilateral mistake is not sufficient to justify relief from a settlement agreement. See Hilley v. Hilley, 140 Mich. App. 581, 585-86 (1998) ("The fact that plaintiff apparently initially misunderstood the alimony provision of the agreement is no basis for setting aside the agreement. Plaintiff is at most arguing the existence of the unilateral mistake, and this Court does not consider a unilateral mistake sufficient to modify a previously negotiated agreement."); and Lambach v. Oakland County Board of County Road Commissioners, 226 Mich. App. 389, 394 (1977) (The court held that "Lambach's alleged mistake was unilateral and would not justify setting aside or modifying a stipulation.").

Moreover, when applying the Pioneer factors, the Court finds that the Shareholders' neglect is clearly not "excusable." They filed adversary proceedings, as opposed to a Rule 60(b) motion, which, if it does not suggest a concern with a reason for filing the latter and possibly receiving a more favorable outcome by way of an adversary proceeding, does suggest a timeliness concern given that what is before the Court was brought several years after the initial compromise was mutually agreed upon by the Shareholders and the trustee. Also, the consumer protection claimants would suffer an added financial and unnecessary burden if the Court were to accept the Shareholders' alleged excusable neglect. Nor is there any inadvertence or surprise involved here.

Therefore, the Court concludes the Shareholders are not entitled to relief because of "mistake, inadvertence, surprise or excusable neglect."

B. Rule 60(b)(2)

Rule 60(b)(2) requires "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." None of the parties argue that there is new evidence now that was not present at the time the Court approved the initial compromise.

C. Rule 60(b)(3)

The Shareholders also argue that constructive fraud exists in the initial compromise, regardless of the trustee's state of mind. Essentially, the Shareholders believe the trustee at a minimum knew that the Shareholders expected certain benefits not provided for in the trustee's draft of the initial documents. The Shareholders argue that their and their counsel's deposition testimony regarding the meetings between the trustee and the Shareholders during the initial settlement discussions evidences some form of fraud. They and such do not and cannot point to any affirmative misrepresentations made by the trustee or failure on his part to perform some sort of duty of disclosure, as is necessary to support such a claim. The trustee's own thoughts or ideas as to what motivated the Shareholder's agreement to the settlement, correct or incorrect, are not a proper basis of constructive fraud (or mutual mistake). "The party seeking to invoke the Rule (Rule 60) bears the burden of establishing that its prerequisites are satisfied." McCurry v. Adventist Health System/Sunbelt, Inc., 298 F.3d 586, 592 (6th Cir. 2002). The Shareholders have not met their burden in this situation on this point.

D. Rule 60(b)(4)

The Shareholders do not argue, nor is there any evidence to support that the Court's Order approving the initial compromise is void for any reason, nor can they argue that the initial settlement itself is void (except to the extent that their view of "void" might be synonymous with their argument relating to "mistake"). Therefore, neither the Shareholders nor the trustee are entitled to relief from the Court's Order pursuant to Rule 60(b)(4).

E. Rule 60(b)(5)

Subsection (5) requires that "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." This is not relevant or involved or argued in this situation.

F. Rule 60(b)(6)

Lastly, the Court may grant relief from its earlier Order if the Shareholders or the trustee can show that "any other reason justifying relief from the operation of the judgment (exists)." Although Rule 60(b) is a catchall provision which allows a court to grant relief for any reason, case law limits the reasons for which a court may grant relief under Rule 60(b)(6). Blue Diamond Coal Co. v. Trs. Of the UMWA Combined Benefit Fund, 249 F.3d 519 (6th Cir. 2001). Courts require that a moving party must show "extraordinary circumstances" in order for the court to grant relief under Rule 60(b)(6).

In this case, neither the Shareholders nor the trustee argue that extraordinary circumstances exist such that entitle them to relief from the Court's prior Order. The only Shareholders' argument that may fit within this subsection is that the initial agreement was unconscionable. The trustee correctly observes that Michigan law allows an agreement to be set aside on the basis of an

unconscionable advantage. See Hubscher & Son, Inc. v. Storey, 228 Mich. App. 478 (1998). However, the Court finds that no unconscionable advantage existed at the time the initial settlement was entered into by the Shareholders. The trustee testified that the Shareholders sought a quick and complete settlement of all matters related to the underlying bankruptcy case and obtained all of the business records and property of the debtor as a result of that settlement, as a result, the trustee ceased investigating these files and inquiry into possible further actions. In exchange, the Shareholders agreed to pay money. There is nothing procedurally or substantively unconscionable about what occurred in the resulting first settlement agreement, and, therefore, no basis for relief pursuant to subsection (6) of Rule 60(b).

Conclusion

As laudable as the trustee's efforts may be to dispose of the controversy and accelerate his administration of the bankruptcy estate, for the foregoing reasons, the Court denies approval of the Trustee's Application to Compromise Controversy with Roland Hansen, John Stewart & Michael Downer. The trustee should present an order to that effect, consistent with that result and the Court's reasoning. Concurrently to its entry, the Court will also enter an appropriate Order to Show Cause why Adversary Proceeding No. 02-3003 should not be dismissed.

Entered: August 02, 2006

/s/ Walter Shapero
Walter Shapero
United States Bankruptcy Judge